Supreme Court, U.S.
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No. 95-1266

In The

Supreme Court of the United States

October Term, 1995

GERALD E. ALEXANDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Law Offices of THOMAS J. BOYLE
THOMAS J. BOYLE
57 Post Street, Suite 815
San Francisco, California 94104
Telephone: (415) 434-4546

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is operational control by the Government essential to the creation of an agency relationship under 46 U.S.C. § 745?

THE NEW POINTS RAISED BY THE OPPOSITION

Respondent argues that the Court of Appeals finding that V.C.I. retained operational control of the SANTA ADELA under the charter made it unnecessary to ". . . . address the question of agency". Petitioner deems this a "new point" within the meaning of Supreme Court, Rule 15.6.

Respondent also asserts that the petitioner claims that the Suits in Admiralty act imposes "strict liability" on the United States. This, too, is a "new point" to which petitioner will also reply herein.

ARGUMENT

1. *Petition of the United States*, 367 F.2d, 505, 509 (3d Cir. 1966) (Opp. 4, 5, 6) contains the following language relevant to this Reply:

> As a matter of legal definition, "agent" of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The accepted distinction between "servant" and "independent contractor" may place Mathiasen in the latter category, *since it is arguable that Mathiasen's day to day working of the ship was not subject to government control.* See Restatement, Agency 2d. § 2. But an independent contractor, no less than a servant may be an agent in that he is *employed as a fiduciary, acting for a principal and with a principal's consent and subject to the principal's overall control* and

> direction in accomplishing some matter undertaken on the principal's behalf. Restatement, Agency 2d, § 14 N (Id. emphasis added).

The above shows that respondent's quotation from *Petition of the United States, supra* (Opp. 5) is out of context.

The second phrase underlined is the portion quoted by respondent. When read with the entire paragraph, especially the first phrase underlined, it does not require anything approaching operational control as a prerequisite to an agency relationship.

Moreover, it shows that the operative section of the Restatement relied upon was § 14N, rather than § 1 (1).

Under § 14N, an entity may be both an independent contractor and an agent at the same time, depending on the nature of the transaction and the surrounding circumstances. See, e.g. *AT&T v. Winback and Conserve Program Inc.*, 42 F.3d 1421, 1436-1439 (3d Cir. 1004); *National Petrochemical Co. v. M/T Stolt Sheaf*, 930 F.2d 240, 244 (2d. Cir. 1991).

The decision below, as well as *Williams v. Central Gulf Lines*, 874 F.2d 1058, 1062-1063 (5th Cir. 1989) cert. denied 493 U.S. 1045 (1990) (Opp. 7) and *Trautman v. Buck Steber Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (Opp. 6) which *Williams* follows, holds that " . . . operational control by the government is (an) essential element of (an) agency relationship." (Opp. 6)[1]

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[1] Contrary to what respondent contends (Opp. 5) petitioner's agency theory is not predicated solely on clause

Operational control is at least control over " . . . the day to day working of (a) ship". Finding such control to be essential to an agency relationship conflicts with *Petition of United States, supra,* to the legislative intent of the statute, and with the settled teachings of this Court.

2. For example, it specifically conflicts with *Cosmopolitan Shipping Co. v. McAllister,* 337 U.S. 783 (1949) (Opp. 5) which made " . . . the liability of the United States . . . exclusive . . . when governmental maritime activity is conducted through private contractors" and which Congress intended to codify in enacting 46 U.S.C. § 745. (Quotation from *Petition of United States, supra,* 367 F.2d at 510, last full paragraph).

It also specifically conflicts with *Calmar S.S. Corp. v. United States,* 345 U.S. 446 (1946) (Opp. 6) which makes it clear that Congress did not intend to treat shipowners who time charter their vessels to the Government any differently from those who demise them. Moreover, the Maritime Lien Act 46 U.S. § 30101 (3) restates this Congressional intent by defining a public vessel as " . . . any vessel owned, demise chartered or operated by the United States Government".[2]

H.30.1 of the charter. It is also based on the fact that the ultimate control of the S/S SANTA ADELA resided with M.S.C. in every respect regarding decisions involving navigation care, custody and sailing routes (Pet. 3) and clauses H1.3(c)(I), H8.3, H.15.1, H15.2, 28.1, 39.1, 39.2, E1.1, F3.1, G1.1, H14.2, H14.3, H4.2 and H24.1 (Pet. App. 13 at fn. 1).

[2] *Hopeman Bros Inc. v. USNS CONCORD,* 898 F. Supp. 338 (E.D. Va. 1995) has invoked this language to prevent seizure of a ship operated by the Government.

3. The United States continues to argue, as it did below, that the 1960 Amendments to the Suits in Admiralty Act cut down the existing rights of seamen on ships in Government service. This Court long ago ruled otherwise. *Amell v. United States*, 384 U.S. 158 (1966).

Moreover, the position of respondent is completely untenable, since the Congress made the Government vicariously liable for every act or omission of its agents "exclusive of any other action by reason of the same subject matter" (46 U.S.C. § 745) – i.e. even in circumstances where, if the agent's principal had been a private person he would not have been liable. See, e.g. *AT&T, supra*, 42 F.3d 1421, 1436-1437 and fn. 17, to the effect that a principal is not generally liable for physical torts committed by its independent contractor agent. (Citing Restatement (Second) Agency § 258). Cf. *Manuel v. United States*, 50 F.3d 1253 (4th Cir. 1995)

This was not altruistic legislation. Congress acted to avoid seizure of vessels – all vessels – in Government service lest the public business be delayed or inconvenienced by efforts to foreclose maritime liens.

4. Contrary to respondent's assertion, petitioner does *not* argue that the Suits in Admiralty Act imposes "strict liability" on the United States for seaman's injuries on ships in Government service. (Opp. 7) Only that, if the Owner of a vessel in Government service would be liable for such injuries, then the United States in the Suits in Admiralty Act voluntarily assumed such liability, relying upon its ability to obtain indemnity from the Owner under the charter, as well as (more significantly), the

insurance coverage against such liability which the owner was required to obtain for itself and the United States.

CONCLUSION IN REPLY

The Petition for a writ of certiorari should be granted, for the additional reasons of clarifying whether operational control by the government is an essential element of an agency relationship under 46 U.S.C. § 745 and of restoring parity between 46 U.S.C. § 745 and 46 U.S.C. § 30101.

Respectfully submitted,

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57 Post Street, Suite 815
San Francisco, California 94104
Telephone: (415) 434-4546

Counsel for Petitioner